No. 596. 250.

Brief for P. C. (on mo.)

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE CURLEY, ALIAS GEORGE CULLY, plaintiff in error,
v.
THE UNITED STATES, DEFENDANT IN error.
} No. 596.

BRIEF OF ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

W. H. TWINE,
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< Not filed — as T. was not member of Bar of Sup. Ct. — Case considered by Court. >

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The statutes of the United States bearing upon the question of writs of error and appeals to the Supreme Court of the United States in criminal cases are briefly as follows:

On February 6, 1898, Congress passed a law providing for a review by writ of error by the Supreme Court of the final judgment of any court of the United States.

Supplement to United States Revised Statutes, second edition, page 639, section 6:

> SEC. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme

> Court of the United States, upon a writ of error, under such rules and regulations as said court may prescribe.
>
> Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error is directed to forthwith transmit to the clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same.

By the act of May 2, 1890, in reference to the courts in the Indian Territory, provision was made for appeals and writs of error from the United States courts in the Indian Territory to the Supreme Court of the United States.

Supplement to Revised Statutes United States, second edition, page 738, section 42:

> SEC. 42. That appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act.

In the act of March 3, 1891, establishing United States circuit courts of appeals, it is further provided:

Supplement to United States Revised Statutes, second edition, page 903, section 5:

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing

circuit courts direct to the Supreme Court in the following cases:

In cases of conviction of a capital or otherwise infamous crime.

Section 13 of said act is as follows:

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

The act of Congress of March 1, 1895, adopted as a part of the criminal law of the Indian Territory chapter 45 of Mansfield's Digest of the Laws of Arkansas (criminal law), with certain provisos, and chapter 46 of the same digest (Criminal Procedure). It also provided for a court of appeals in the Indian Territory.

Supplement to Revised Statutes, vol. 2, Nos. 1–5, pages 392–398:

SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the supreme courts of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas; and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as

to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said courts in said districts to said appellate court in criminal cases shall be prosecuted under the provisions of chapter forty-six of said Mansfield's digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States.

* * * * *

SEC. 13. That none of the provisions of any other acts, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in said Indian Territory, except so far as they come in conflict with the provisions of this act, are intended to be repealed, or in any manner affected by this act, but all such acts and laws are to remain in full force and effect in said Territory.

The act of January 25, 1897, withdrew from the Supreme Court jurisdiction of criminal cases not capital.

29 Vol. Statutes at Large, page 492.

CHAP. 68. That so much of section five of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words "or otherwise infamous," so that the same will read "in cases of conviction of a capital crime;" and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital: *Provided*, That no case now pending in the Supreme Court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act shall be hereby affected, but in all such cases the jurisdiction of the Supreme Court shall remain, and said Supreme Court shall proceed therein as if this act had not been passed.

Approved, January 20, 1897.

ARGUMENT.

The United States attorney contends that the United States court for the northern district and the United States court of appeals in the Indian Territory, are not circuit or district courts. They may not be such courts, in terms, and we do not claim that the several United States courts in the Indian Territory are circuit and district courts properly; but they are United States courts, and punish violations of the general laws of Congress occurring within the Indian Territory, as well as the

violations of the special laws enacted for the Territory. They are United States courts, created by Congress to enforce all laws of the United States, general or special, within the Indian Territory.

This is not an organized Territory with a local government and a local legislature chosen by the people to make the laws for it. Congress gave us the government and the laws, and provided the courts to administer these laws. These courts are therefore as much United States courts as the circuit or district courts, with even a more extended jurisdiction within the limits of the Territory. They are a part of the judicial system of the United States, charged with the administration of the laws within the Territory, and are under the supervision and control of the Supreme Court of the United States as completely as any courts can be which are created by act of Congress.

The act of February 6, 1889, heretofore cited, provides for the review by writ of error of the final judgment of any court of the United States in capital cases. It also provides that such writ of error shall be allowed as a matter of right, and prescribes the duties of the clerk of the court where the case is tried and the duties of the clerk of the Supreme Court, and the manner of suing out the writ of error, and limits the time.

This statute is perhaps declaratory of the right, which a person accused of a capital offense against the laws of the United States at all times had, that of having his case reviewed by the highest tribunal of the land on a proper case made and presented.

JURISDICTION AS TO CRIMES.

The original act creating United States courts of the Indian Territory gave them a limited jurisdiction.

Supplement to United States Revised Statutes, second edition, page 671:

> SEC. 5. That the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this act defined not punishable by death or by imprisonment at hard labor.

Under these statutes jurisdiction as to crimes punishable with death or imprisonment at hard labor was retained by the United States district courts at Fort Smith, Ark., and Paris, Tex.

By the act of May 2, 1890, the criminal jurisdiction of the courts in the Indian Territory was somewhat enlarged.

Supplement United States Revised Statutes, second edition, pp. 731–738:

> SEC. 33. That the provisions of chapter forty-five of the said general laws of Arkansas entitled "Criminal law," except as to the crimes and misdemeanor mentioned in the proviso to this section, and the provisions of chapter forty-six of said general laws of Arkansas entitled "Criminal Procedure," as far as they are applicable, are hereby extended over and put in force in the Indian Territory, and jurisdiction to enforce said provisions is hereby conferred upon the United States court therein.
>
> *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkan-

sas have provided for the punishment of the same offenses the laws of the United States shall govern as to such offenses.

Jurisdiction of the higher felonies was still retained by the courts at Fort Smith and Paris.

By the act of March 1, 1895, full, original, and exclusive jurisdiction of all offenses against the laws of the United States was conferred upon the courts in the Indian Territory.

Statutes at Large, page —, section 9:

> This act also readopts chapters forty-five and forty-six contained in Mansfield's Digest of the Laws of Arkansas.
>
> SEC. 4. * * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal law," except as to the crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-six of said laws of Arkansas, contained in said Digest, entitled "Criminal Procedure," and chapter ninety-one of said general laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended to and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory: *Provided*, That in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to said offenses, except for the crime of larceny, the punishment for which shall be that prescribed by the laws of the State of Arkansas, any law in force in said Indian Territory to the contrary notwithstanding.

The act of February 6, 1889, clearly gave to the Supreme Court the right to review. The United States attorney contends, however, that this law is modified and repealed by the act of March 3, 1891. It was modified by the latter act, but in no sense repealed as to the jurisdiction of capital cases. This court has decided that the latter act places the court in the Indian Territory on the same footing with regard to writs of error and appeals to the Supreme Court as that occupied by the circuit and district courts of the United States. (*McLish* v. *Roff*, 141 U. S., 664; *In re Chausen*, 140 U. S., 200.)

But the United States attorney also contends that the act of March 1, 1895, repeals section 13, giving this right of appeal from the Indian Territory courts, by establishing another appellate tribunal in the Indian Territory for that purpose.

There are no words of repeal in the last-named statute; on the contrary, in section 13 of that act it is especially provided that none of the provisions of any other act, or of any of the laws of the United States, or of the State of Arkansas, heretofore put in force in the Indian Territory, except so far as they are in conflict with this act, are intended to be repealed or in any manner affected in said Territory.

It is only, then, in case of irreconcilable conflict that any previous statutes can be taken as repealed; because one statute is not to be construed as a repeal of another if it be possible to reconcile the two with each other.

McCool v. *Smith*, 66 U. S., 218.

Wood v. *United States*, 16 Pet., 342.

We contend therefore that, in view of all these statutes, appellate jurisdiction for capital cases still remains in the Supreme Court of the United States.

The second paragraph of March 1, 1895, provides for appeals from the final decisions of the United States court of appeals in the Indian Territory to the circuit court of appeals for the eighth circuit.

By the act of January 20, 1897, heretofore cited, jurisdiction of the Supreme Court of offenses not capital was withdrawn from the Supreme Court and was vested in the circuit court of appeals.

Thus it would seem, according to the contention of the United States attorney, that appeals in capital cases go to the court of appeals in the Indian Territory and stop there; which, according to the provisions of the above-cited laws, appeals in cases not capital can still be taken for further review from the Indian Territory appellate court to the circuit court of appeals. There is no law anywhere giving appellate jurisdiction to the circuit court of appeals of capital crimes.

It would be difficult to believe that Congress intended to give greater advantages of review in cases not capital than in capital crimes.

That would not be in harmony with the spirit of the law, public policy, and those general principles which lie at the foundation of justice and which afford protection to life.

Again, the United States court of appeals in the Indian Territory, established by the act of March 1, 1895, section 11, does not have as full and complete jurisdiction over the trial courts in the Indian Territory

as the supreme court of Arkansas has over the nisi prius courts of that place.

It was only the jurisdiction and powers of the supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, "so far as they are applicable," which were conferred upon the appellate court in the Indian Territory. Final appellate jurisdiction of a capital crime by this court "would not be applicable," because of the previous legislation cited and in view of what seems to be the fact that a further review of its decisions is provided by the circuit court of appeals in all felony cases not capital.

The United States attorney also takes the position that chapter 46 of Mansfield's Digest of the Laws of Arkansas is the sole law of procedure for the United States courts in the Indian Territory in criminal cases and governs as to writs of error and appeals.

This is a doubtful position and one that may return to plague him hereafter. It opens up a grave question for discussion which it will hardly be necessary to fully argue in consideration of this motion. Suffice it to say, that the law adopting chapters 45 and 46 of Mansfield's Digest provides that when the laws of Arkansas have provided for the punishment of the same offense as the laws of the United States, then the laws of the United States shall govern as to such offense.

Is this provision confined alone to the substantive laws of the United States, or does it likewise include the procedure applicable to certain crimes? A person charged with murder by the common-law indictment,

which is without distinction as to degrees above manslaughter, might well insist that he should have twenty peremptory challenges against five for the Government, instead of ten in favor of the Government as provided by the Arkansas statute. He might also insist that the jury should be instructed that they had the right to qualify their verdict in cases of conviction by adding thereto "without capital punishment." It might be that he would be entitled to these substantive rights, secured by the laws of procedure provided for the United States courts by the general laws of Congress on the trial of a crime which depends for its definition upon the general law. In every system of criminal jurisprudence substantive law and the administrative law go hand in hand, and it should be very clear indeed that Congress intended to graft the entire and exclusive procedure of one criminal code upon the substantive law of another, because the procedure in every code limits and modifies the bald definition of the crime, and the practice and decisions of the courts have made each code homogeneous and complete within itself.

For these reasons we believe this case is properly and rightfully here, and that the motions should be overruled.

All of which is respectfully submitted.

W. H. TWINE,

Counsel for George Curley, Plaintiff in Error.